

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7597 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

TATA CHEMICALS LIMITED.....Petitioner

Versus

ADITYANA NAGAR PANCHAYAT.....Opponent

Appearance:

MR SB VAKIL for the Petitioner

MR ND NANAVATI for the Respondent No. 1

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 30/08/2000

ORAL JUDGEMENT

The petitioner-Company, situated within the local limits of the opponent impugns the validity and legality of the claim, demand and notice dated 26th October, 1991 regarding levy of octroi duty of the bygone period on the ground that the same are violative of Article-14,

19(1)(g) and other provisions of the Constitution of India etc.

2. The facts leading the petitioner to prefer this petition under Article-226 of the Constitution of India may in brief be stated. The petitioner-Company is a Company within the meaning of the Companies Act, 1956. It is engaged in the business of manufacturing of Soda Ash. Lime Stone and Salt are the basic raw materials used in manufacturing process of Soda Ash. The Company is the holder of lime stone quarry on lease in Survey Nos.602 and 516 of village Adityana, Taluka-Ranavav, in Junagadh District. The office is situated in Plot No.255, of Survey No.602. The Company brings from Porbandar to its quarry office, machineries, spare-parts and other materials required for running the quarry by Porbandar-Adityana road. Formerly Adityana was having village panchayat and later on it came to be converted into Nagar Panchayat. The opponent-Panchayat passed the resolution on 19th August, 1960 for levying octroi duty on the goods brought within its octroi limits. The Commissioner, Rajkot Division, Rajkot by his order dated 06/02/1961 sanctioned the levy of octroi duty. After such permission the opponent-panchayat started to levy octroi from its different octroi posts as and when the goods were brought within its octroi limits. However, the opponent-panchayat never demanded the octroi duty from the petitioner on the goods brought by it from Porbandar or elsewhere to its lime stone quarry. It was only in the Year-1984, the opponent-Panchayat demanded the octroi duty on the goods brought by the Company within its' octroi limits. On 15th August, 1989, the petitioner, therefore, filed Special Civil Application No.1966 of 1989 for a writ of mandamus directing the opponent to furnish a certified copy of the order of the Collector, Junagadh demarcating the octroi limits. Whether the premises of the petitioner-Company were within the octroi limits was the question of fact requiring full-fledged inquiry. The petition was, therefore, withdrawn. Thereafter, the petitioner-Company was convinced about the fact that its office where the goods were being brought was situated within the octroi limits. Both the parties then arranged parleys so as to find out viable solution qua the octroi duty sought to be levied right from 1961. According to the opponent, Rs.7,53,000/- towards the octroi duty, and Rs.75,30,000/being the penalty amount thereon in all Rs.82,83,000/were being demanded. After prolonged discussion it was agreed that the petitioner would pay lumpsum amount of Rs.51,000/- per year towards the claim of the octroi duty for the period from 1st April, 1984 to

31st March, 1990. According to such settlement vide its letter dated 7th November, 1990, the petitioner sent a cheque for Rs.3,06,000/- to the opponent in full and final satisfaction of the claim. The petitioner had already paid in advance Rs.25,000/- qua the octroi duty payable during the Year-1990-91, a receipt of which is also issued by the opponent on 8th November, 1990; and, thereafter, the petitioner is regularly paying octroi duty as and when the goods are brought within the octroi limits. The petitioner is having several Air-Compressors, Drills and other Machineries which are used in different lime stone mines in the areas surrounding Adityana, but at no point of time, the respondent preferred to levy octroi duty. The petitioner-Company also purchased one Air Compressor on 7th December, 1990 and took it to both the mines. When the same was being brought to the Company's quarry workshop at Adityana on 5th September, 1991, it was stopped and octroi was demanded from the operator. The petitioner found that the demand made by the opponent for the duty right from 1961-62 was not consistent with law, because upto 1984 never the octroi duty was demanded. In view of section 178(ii) of the Gujarat Panchayat Act, 1961 it was beyond the power of the panchayat to levy octroi duty. The opponent-Panchayat informed the petitioner to produce relevant records with regards to the octroiable goods brought within the octroi limits right from 1961-62, failing which it was made clear that the opponent will decide and determine what amounts should be recovered from the petitioner. The petitioner was of the belief that the opponent had no power to levy the octroi duty from 1960 and also to demand the same in 1991 relating to the period from April 1961 to March-1984. If at all, the opponent was having that power, it was arbitrary and unjust. The notice dated 26/10/1991 given demanding the octroi duty is illegal. An opportunity of being heard was not given to the petitioner. Upto September, 1991, the petitioner was never called upon to pay the octroi duty relating to the period prior to 1994. For the first time the resolution was passed on 06/02/1991. On the amount of octroi duty 100% penalty was also sought to be levied. The notice and claim put forth are, therefore, bad in law. This petition is, therefore, filed for issuance a writ of mandamus or any other appropriate writ quashing and setting aside the impugned notice dated 26/10/1991 and quashing the demand made and threats given vide letter dated 05/10/1991 whereby the demand for the first time was made after 1961-62, the year from which the octroi duty came to be imposed.

3. On several grounds, the learned advocate for the parties have submitted refuting the case of the otherside. Firstly, it is the contentions of the learned advocate representing the opponent that this court may abstain from exercising the writ jurisdiction under Article 226 of the Constitution of India especially when other efficacious remedy is available and yet not resorted to by the petitioner. According to the learned advocate for the opponent, when the demand was made, old Gujarat Panchayat Act, 1961 was in force and as per section 186(6) of that old Act, the appeal was required to be preferred to the District Panchayat against the claim advanced by the opponent-Panchayat. Subsequently, the Gujarat Panchayat Act, 1993 came into force and the said section finds place in the new Act as section 200(6). As per that section also which is couched in the same words, the persons aggrieved by the assessment, levy, or imposition of the tax or fee has to file the appeal to the District Panchayat within the prescribed period. When there is such provision about the appeal, and the appeal is not preferred by the petitioner against the demand made, it would not be just and proper on the part of this court to exercise the powers under Article 226 of the Constitution. In support of such contentions, the learned advocate for the opponent has relied upon the decisions of the Supreme Court in the cases of C. A. ABRAHAM V/s. INCOME-TAX OFFICER, KOTTAYAM AND ANOTHER, AIR 1961 S.C. 609 and COMMISSIONER OF INCOME TAX, LUCKNOW V/s. U.P. FOREST CORPORATION, (1998) 3 S.C.C. 530.

4. In reply to such contention, the learned advocate representing the petitioner submits that the court is not debarred from entertaining the application and disposing the same of in accordance with law. Even in the case where efficacious remedy is not resorted to the court is vested with the discretion to entertain and decide the application and in the facts and circumstances of the case the discretion has to be exercised. If the court finds that it would be futile to direct the petitioner to resort to the efficacious remedy available for the same may fall short for doing complete Justice and at last the petitioner will have to come again to this court for the order he craves for the present and this Court will have to pass the order at that time, it would amount to unnecessarily putting the petitioner to several difficulties or hardships as well as prolonging the finality in the matter which is condemned by law. Further after a long time, it would not be just and proper to direct the party to first file the appeal, and then if required to again prefer the petition in this

Court. Looking to the issue involved the petitioner will have to come again to this Court for appropriate order. It would be better if appropriate order is passed at this stage and the dispute is set at rest finally rather than driving the petitioner craving for speedy Justice from pillar to post.

5. Whether this court can entertain the petition, in case where efficacious remedy available in law to the petitioner is not resorted to, is the question that arises for consideration. Such question arose before this court in the case of DAHYABHAI DEVJIBHAI VASAVA V/s. DY.DIST.DEV. OFFICER (Rev.) BROACH, 20(2) : 1979 (2) GLR 678, wherein it is held that even if the remedy is not exhausted, still however when the petition is already admitted, at the time of final hearing after about 3 1/2 years it will not be just and proper to dismiss the petition on the ground that alternative remedy is not exhausted. When the petition is admitted despite the fact that efficacious remedy available in law is not exhausted, it would mean that the petitioner was led to believe that this court was not insistent on the normal rule of exhausting alternative remedy before approaching this Court, and it would be too late now to reject the application, after more than 3 1/2 years have rolled by. When a similar question arose before this court, in another case of BHAVABHAI BHADABHAI MARU V/s. DHANDHUKA NAGAR PANCHAYAT, 32 (2) : 1991 (2) GLR 1339, it is made clear that the existence of alternative remedy is the factor to be taken into consideration by the Court while entertaining the petition under Article 226 of the Constitution of India. Even if the existence of alternative remedy available in law, it would not be a bar to exercise extraordinary jurisdiction under Article 226 of the Constitution of India. Remedies which are burden-some and cause undue delay and hardship cannot be said to be suitable or adequate. If the petitioner is relegated back to an alternative remedy which is likely to consume time and which would deprive the petitioner of his very means of sustenance, it would be just and proper to exercise jurisdiction vested under Article 226 of the Constitution of India rather than directing the petitioner to first resort to efficacious remedy likely to consume several years for final redressal of grievances. Again likewise question arose before this court in the case of K. S. JOY V/s. INDIAN INSTITUTE OF MANAGEMENT & ORS., 35 (1) : 1994 (1) GLR 57, wherein it is made clear that once the petition is entertained and heard by the High Court on merits, it would not be proper to relegate the party to an alternative remedy. Even if in law the efficacious remedy is available as an

alternative adequate remedy, the same does not oust the jurisdiction of the High Court to entertain the petition and decide the same, for relegating the petitioner to alternative remedy after about 4 1/2 years, would not be an adequate efficacious remedy. For holding so this court in that case also relied upon the decisions of the Supreme Court rendered in the case of ARIDAY NARAIN V/s. I. T. OFFICER, BOMBAY, AIR 1971 S.C. 33 AND RAM & SHYAM COMPANY V/s. STATE OF HARYANA & ORS., AIR 1985 S.C. 1147.

5. Perusal of all these decisions making in the law on the point clear reveals that whenever other efficacious remedy is available in law, the High Court should not entertain the writ petition; but if the petition is admitted and the petitioner is led to believe that the Court does not or will not insist on normal rule of exhausting alternative remedy, or the petition is heard on merits, it would not be just and proper to direct the petitioner to resort to the efficacious remedy, and come again to the court, if it is necessary after the order in the proceeding (the alternative remedy) is passed because exhaustion of the alternative remedy as made clear by the Supreme Court in the case of RAM & SHYAM COMPANY V/s. STATE OF HARYANA & ORS. (Supra) is a rule of convenience and discretion rather than rule of law. At any rate it does not oust the jurisdiction of the Court. Whenever at the admission stage, the court find that the alternative remedy is available, the petition at the threshold should be dismissed, directing the petitioner to resort to the other efficacious remedy available in law, but if the petition is admitted and the rule is issued, and, thereafter, considerable time is passed, and the petition is heard on merits, the court should not dismiss the petition only on the ground that other efficacious remedy when available ought to have been resorted to. I may also add that in the cases where appeal against the order challenged though permissible in law, as an efficacious remedy, the decision in appeal, however, is not going to set every question or dispute at rest and keep the same burning, meaning thereby doing complete Justice is not possible, it would not be just and proper to direct the petitioner to resort to other alternative remedy available in the law. In the case of C. A. Abraham v/s. Income-Tax Officer, Kottayam and Another, (Supra), the Supreme Court has also observed that when alternative remedy is available jurisdiction under Article 226 of the Constitution of India cannot be invoked, but in that case the petition was entertained and leave was already granted, observing that it would not be justified at that

stage to dismiss the appeal in limine. In that case of Commissioner of Income Tax, Lucknow v/s. U.P. Forest Corporation, (Supra), the Supreme Court though observed that such writ petitions, ought not to have been entertained by the High Court as adequate alternative remedy was available, it did not think it proper to dismiss the petition on the ground that other adequate alternative remedy was available. Thus, the decisions cited by the learned advocate representing the opponent also lay down that ordinarily rule is not to entertain the petition when adequate and efficacious alternative remedy is available but when the petition is already admitted and years have passed thereafter, equity and prudence dictate not to direct the petitioner to resort to the alternative remedy available in law, and dismiss the petition.

6. This petition was presented on 12/11/1991 and on 15th December, 1991 rule was issued. Thereafter, the petition was placed for effective hearing, but could not be heard within reasonable in time, and by now more than eight years have rolled by. Further, the petition is being heard on merits for the last two days. It would not, therefore, be just and proper to direct the petitioner at this belated stage to resort to the efficacious remedy available under section 200(6) of the Gujarat Panchayat Act, 1993 and then come again to this court, if it is aggrieved by the order. Directing petitioner to resort to the alternative remedy of appeal available would be a curse, it would be burdensome and cause several hardships as well as undue delay. It should also be stated that the other alternative remedy must be efficacious and adequate remedy. In the case on hand within what period the demand should be made is the question of law raised by the petitioner and the appellate authority hearing the appeal under section 200(6) of the Gujarat Panchayat Act, 1993 as rightly submitted, would not be able to decide the question relating to the interpretation of the provision of section 200(6) of the Gujarat Panchayat Act and connected questions of law. Even if, therefore, the petitioner is asked to resort to that alternative remedy, it would not be efficacious or adequate because the petitioner will not get complete Justice and will have to come back to this court for having the finding on the issues posed before this court. In such facts and circumstances of the case, it would not be just and proper to direct the petitioner to resort to the alternative remedy viz the appeal. I will now switch over to the next point that arises for consideration.

7. The learned advocate for the petitioner now contends that after the demand was made issuing the notice, the parties negotiated for settlement of the dispute. It was agreed that when the demand was made for the first time in 1984, the petitioner-Company would in the absence of any other record, pay the octroi duty on lumpsum basis i.e. at the rate of Rs.51,000/- per year. When that proposal was accepted by the opponent-Panchayat, as full and final settlement of the whole claim right from 1961-62, the petitioner-Company vide its letter dated 7th November, 1990 sent the cheque for Rs.3,06,000/- which was accepted by the opponent-Panchayat and the letter acknowledging the same was also sent to the petitioner-Company. When the opponent-Panchayat has thus accepted the payment of Rs.3,06,000/- by a cheque by way of full and final satisfaction of the whole of the claim, it is now not open to the opponent-Panchayat to again demand the octroi duty relating to the period from 1961-62 to March-1984. On this count the petition must fail.

8. Against such contention, the learned advocate for the opponent-Panchayat submits that no doubt in view of the letter dated 7th November, 1990, the copy of which is produced at Annexure-E the settlement is arrived, at and the opponent-Panchayat has also accepted the cheque for Rs.3,06,000/-, but it was not accepted as full and final settlement of the whole of the claim; it was relating to the claim for the period from 1st April, 1984 to March, 1990. The claim relating to the period from 1961-62 to March-1984 even still survives and the petitioner cannot escape of its liability to pay the octroi duty under the guise that cheque for Rs.3,06,000/- was sent by way of full and final satisfaction of the whole claim from 1961-62.

9. Admittedly, in this case, writing the letter dated 5th October, 1991, the copy of which is produced at Annexure-A, the Panchayat demanded the octroi duty from 1961-62. The parties were then having correspondence, and arranged several parlays for settlement. As per the letter dated 7th November, 1990 at Annexure-E viable solution was worked out. The petitioner-Company agreed to pay the octroi duty for a period of 6 years from 1st April, 1984 (because for the first time the demand was made in 1984) to 31st March, 1990. The petitioner-Company also with a view to close the chapter for ever agreed to pay the octroi duty at the rate of Rs.51,000/- per year and accordingly by way of full and final satisfaction of the whole claim from 1961-62 the cheque for Rs.3,06,000/- (Rs.51,000 X 6) was given,

which was without any protest or clarificatory note accepted by the opponent-Panchayat. When accordingly the settlement was arrived at despite the fact that octroi duty from 1961-62 was demanded it can be said that the whole of the claim was settled for Rs.3,06,000/- and when the cheque was accepted by way of full and final settlement of the whole claim, it is now not open to the opponent-Panchayat to demand the octroi duty relating to the period from 1961-62 to 31st March, 1984.

10. However, the case if considered in the alternative the opponent-Panchayat cannot have a ground to stand-upon. Even, if it is believed that the petitioner - Company sent the cheque relating to the six years period from 1st April, 1984 to 31st March, 1990, the question that arises for consideration is whether the Panchayat can claim the octroi duty for a period of 22 years from 1961-62 to 1983-84, presenting the application in 1991. When a query was made to the learned advocate representing the opponent-Panchayat as to how it would be just on the part of the Panchayat to demand the octroi duty right from 1961-62 after years have rolled by, the learned advocate for the opponent-Panchayat submits that under section 200 of the Act, the Panchayat is vested with the power to levy the tax and fees inclusive of octroi duty, but nowhere in the Act the time limit to demand and recover the tax amount is prescribed. In the absence of that provision, there is no impediment in the way of the opponent-Panchayat to demand the octroi duty at any time, after the same becomes due and it would not be open to the party liable to pay the tax to resist the demand on the ground that the same is belated or there is inordinate delay. It is also the contention that to legislate is the function of the legislature and not of the Court i.e. Judiciary. The Court has to interpret the law. It cannot add or subtract or read a word or something which is not there in the provisions of the Act or law in order to supply the omission which the legislature in its' wisdom did not think it just to have it in the provision, and thought it fit to omit to express. The Court is not entirely a free agent empowered to assume from a statute or its provision and give a meaning and amplitude far beyond the intention of the legislature. The Court has not to innovate at pleasure and allow its own predilection or ideology or ideals to be the determining factor. It would not be hence just and proper while interpreting Section 200 of the Gujarat Panchayat Act, 1993 to assume or fix up time limit relating to recovery of octroi duty. To do so would amount to usurping the powers to legislate which the Court does not have.

11. Of course the function of the judiciary is not to legislate but to interpret the Laws, and while interpreting it should not bring in something foreign to the law or read or assume what the legislature in its' wisdom thought it wise not to bring in. However, the sphere of interpretation can not always confine to what has been canvassed for the life of law is not the logic but experience; and that the judicial process is a technique founded upon experience of the judge and not upon the scholastic interpretation or tricky or unpragmatic i.e. too technical or literary interpretation of authoritative text. The interpretation should, therefore, be creative and meaningful as well as balancing the clashing facets and not too technical, or unjust to one, giving disproportionate benefit to others putting some persons or sections of the society to precarious position. In other words the Court has to see that its' interpretation does not come out to be arbitrary or unreasonable or agonising or oppressive. If required the Court should bear in mind other provisions of the same Act or other applicable laws in force.

12. True, there is no interwoven or separate provision fixing the period within which the Panchayat levying the duty has to demand and recover the duty; but the demand or claim must not be rendered, arbitrary, vexatious or exasperating or oppressive. Ordinarily, therefore, so far as the octroi duty is concerned, the same is to be levied, and the same is being levied at the time when the dutiable goods are being brought into the octroi limit; but there may be cases where certain persons liable to pay the octroi duty would with a view to evade the octroi duty surreptitiously bring the goods within octroi limits and evade the duty. In such cases, it would not be possible for the Panchayat or tax collecting staff to levy the same at the time the goods are being brought into the octroi limits. The panchayat or tax collecting authority in cases of evasion of octroi duty can therefore putforth its' demand subsequently; but within what period is the question that arises for consideration. If the law applicable in respect of the levy of the duty is silent as to the time limit within which the demand and recovery of the tax or duty, must be made, the same must be done within reasonable period from the date the cause to levy the octroi duty arises. In this regard the decisions, one rendered by the Supreme Court in the case of State of Gujarat V/s. Patel Raghav Natha and others, AIR 1969 S.C. 1297 = 10 G.L.R. 992 and another by this Court is Bhagwanji Bawanji Patel V/s. State of Gujarat, XII GLR 156 are the good guide which

lay down that within reasonable time action should be taken. Considering other provisions of the Bombay Land Revenue Code and facts of the case, in those decisions it is made clear what can be the reasonable period. The provisions of Gujarat Panchayat Act are not the good guide. In the absence of helping provision in the Act reasonable period in the case on hand should be taken to be the period which the law of limitation prescribes for initiating the action for the recovery of tax/duty. The action for demand and recovery of the octroi duty is governed by Article 113 of the Indian Limitation Act. As per the said provision the demand and recovery of octroi duty has to be made within 3 (three) years from the day the right to sue accrues. The reasonable period in such cases should, therefore, be considered to be 3 (three) years. When the provision is accordingly interpreted, it would not amount to legislating by judiciary intruding in to the field of legislature.

13. Even otherwise, it may be stated that if the above provision of the Act qua levy of octroi duty is resorted to after considerable long of time the same would certainly operate as an engine of oppression, and the claim would take the shape of the stale claim, putting the person to precarious situation. The claim put forth after the period of limitation prescribed cannot be allowed to stand or hold the field and same has to be quashed because the cardinal principle is that whatever is set well firmly since long owing to inaction on the part of the authority amounting to closure of the chapter cannot be upset at the sweetwill of the authority exercising power and taking action. If at any time i.e. after reasonable time the action regarding the recovery of the tax is taken, it would be irksome abashing, persecutory as well as infelicitous to those who are called upon to pay the duty because after a very long time he will have to struggle like a fish out of water so as to get through the precarious position for want of necessary record and proof. Equity and good conscious therefore demand that the tax or duty has to be collected at the right earnest i.e. as and when the same becomes due or within reasonable period. If time limit about its' recovery is not fixed, the Court can read implied or wovern aspect i.e. reasonable period while interpreting the provision because the statue as held by the Supreme Court in the case of TATA ENGINEERING & LOCOMOTIVE CO. LTD V/s. STATE OF BIHAR AND ANOTHER, 2000 (5) S.C.C. 346 should be construed not as theorems of Euclid, because in that case, it would amount to becoming too literal in the meaning and to see the skin and miss the soul. In other words for implementation of the

provision, when time limit is not fixed, the same has to be assumed keeping the law of limitation in mind for the law cannot encourage, arbitrariness, vexation and excruciation or oppression. Such interpretation checking or curbing the resultant agonizing situation and appearing meaningful if accepted, it would not amount to legislating as submitted.

14. In the case on hand, a demand relating to the period from 1961-62 to 1983-84 is made and that too after a period over seven to twenty years. The claim at the time of demand had become a stale-claim. The demand ought to have been made within the period of limitation stated hereinabove. As that is not done for the reasons stated hereinabove the claim, being stale and having taken the shape of arbitrariness or unreasonableness cannot be allowed to stand. The same being iniquitable, vexatious, oppressive and excruciating and upsetting what is set well since long, is required to be quashed.

15. For the aforesaid reasons, the petition is allowed. The demand of octroi duty made by the letter dated 05/10/1991, and the notice dated 26/10/1991 calling upon the petitioner to pay the octroi duty for a period from 1961-62 to 31st March, 1984 is hereby quashed and set aside, and the opponent-Panchayat is hereby restrained from demanding or levying the octroi duty relating to the period from 1961-62 to March-1984 making it clear that it would be open to the panchayat, to levy the octroi duty as and when the dutiable goods are brought within the octroi limits by the petitioner henceforth. Rule accordingly made absolute.

16. While departing it is hoped that D.D.O or other competent authority will keep a constant vigile, and if he finds any inaction, laxity, dishonesty, mischief or connivance qua demand and recovery of octroi duty, not only on the part of those whose duty is to demand and recover the octroi duty in time and check evasion thereof but also on the part of those who by one or another way or directly or indirectly encourage or dictate to help the evasion of octroi duty, he shall take appropriate action to eradicate the evil.

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(vrpanchal)*